APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, vs. CONTINENTAL OIL COMPANY, Defendant	}	Civil No. 4763

OPINION OF THE DISTRICT COURT
[October 11, 1967]

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[73]

THE COURT: Is there anything that any of you wish to say? Anything further?

MR. SOMERVILLE: Not for the government, Your Honor.

MR. SEARLS: Not for the defendant, Your Honor.

THE COURT: Well, I was in hopes that you would talk a little more about this *Pabst* case to see just exactly what was required.

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Now, in reading the *Pabst* case I found that there were two sections to it and the first section has to do with this matter of what is the relevant area, the geographic market, whatever it is; that I was supposed to consider, and in that, of course, it recites that the Court is to consider any section of the country. Then there is a second part to it, or second section to it, that goes into the question of per-

centages. In the second section, of course, it refers to the *United States versus Von's Grocery Company,* which is found in the same volume. That is 384 US at 276.

Now, I felt that attempting to limit this case to the question of the relevant market area might not be exactly what the Supreme Court had in mind. If I was sure that that's all the Supreme Court would do when they considered this case was decide what the relevant market area was, then I could go on that assumption. But I don't think that assumption would be followed out by the Supreme Court. It isn't what any particular person might think is proper, it's what Congress has said.

In remarking about that, the Supreme Court said: "It passed an amended Section 7 on the premise that mergers do tend to accelerate concentration in an industry. Many believe that this assumption of Congress is wrong and that the disappearance of small businesses with a correlative [75] concentration of business in the hands of a few is bound to occur, whether mergers are prohibited or not. But, it is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden, which, in effect, the courts should they now require proof of the Congressional premise that mergers are a major cause of concentration. We hold that a trend toward concentration in an industry, whatever it causes, is a highly relevant factor in deciding how substantial the anti-competitive effect of a merger may be."

In other words, it isn't what I might think or what any individual might think, but it's what Congress has said about the matter that the Supreme Court is trying to carry out here.

Now I don't believe this Court would — or the Supreme Court would review this case without reviewing it in the

light of all the cases they had previously decided, including the *Von's Grocery Company* case. Now that case also was decided after I decided the present case, and in that case, even though the District Court decided that the merger of the companies would not effect [*sic*] competition, the Supreme Court reversed the District Court, anyway, and the District Court made findings of fact and conclusions of law that there was no reasonable probability **[76]** that the merger would substantially lessen competition. Those are not the exact words — or that it wouldn't create a monopoly, and then concluded, therefore, that there was nothing illegal about the merger. And, of course, the Supreme Court reversed the District Court and held that the merger of the two companies was illegal.

Now I realize in this case that it isn't a merger. It's an acquisition. But the same rule would apply.

Now, in the *Von's Grocery Company* case the Supreme Court said this: "This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor."

In other words, whether or not a merger takes place because one company is about to go under or both about to go under, is immaterial. I think the same would be true in the case before the Court; whether or not Malco was about to go under [or Continental Artesia refinery] would only last a couple of years, in the light of this *Von's Grocery Company* case would be immaterial. I took all of that into effect in a writing [*sic* — arriving] at my other decision. But, when I read the *Von's Grocery Company* case when it came out I wondered if I had errored [*sic*] in this case and I might state that I decided it the very best I knew how.

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The Supreme Court sent it back for further consideration. Now, in view of that I considered this case from a new light, from a different light.

Now my figures in the decision were just a little different than the figures in your Jurisdictional Statement. They took their figures from Government's Exhibit Number sixty-nine. I took my figures from a stipulation of facts. But, the difference was not great. My finding was that Malco, for 1958, produced six and four-tenths percent of the gasoline. I want to get it for New Mexico — not the relevant market area, if I can find it here. I think I had it for New Mexico.

Well, I will use the figures in this exhibit since they are not too far different. They are probably just a little larger than what was in my decision. But, in the appendix C here to this Jurisdictional Statement is Table two, which is the total sales of gasoline in New Mexico in 1958, excluding the sales to refineries, and it showed that Continental was fourth in New Mexico with 9.66 percent of the sales; that Malco was seventh with 6.74 percent of the sales. I can't remember the figures I used, but they were just short of seventeen percent, the two of them together.

Now if I read the Supreme Court cases correctly, they hold that that's just inherently bad, [78] regardless of what the government may prove in the way of what happens.

Now in this case I realize that there was a lease of the distributing facilities to Mr. Copple. That was for a ten-year period of time, and I take that to mean that that would change the picture, but as I read the Supreme Court cases they hold that if there's a substantial joinder of companies that have or have had this market area, or this market whatever you might call it, that it is inherently bad and that, therefore, it's in violation of the act of Congress.

Now this case has been before this Court twice. Twice it's gone up to the Supreme Court and twice it has come back. I feel that the Supreme Court felt there was something wrong with my decision or they wouldn't have sent it back, but I feel there was more wrong with it than just the relevant market area, and I believe that the complete consideration of both of the cases would bear that out. And that if it were to go up again, that the Supreme Court — that is, if I were to refuse to change my position, that the Supreme Court would send it back.

Now I don't think that any of my findings of facts about percentages were wrong. I think that in the light of the Supreme Court cases, perhaps my conclusions [79] were wrong rather than my percentages. I felt that under all of the facts that the government shouldn't prevail. But, in view of the two later cases I feel that I must comply with the ruling of the Supreme Court, and our system the Supreme Court is the final arbitrator of these matters and they have the final say and I feel that they have spoken and that it is encumbant [*sic*] upon this Court to fall in line with what the Supreme Court has said.

Accordingly, the Court is going to reverse its previous judgment and find in favor of the United States.

Now I don't know just how we go about handling this. I am sure that — I say I am sure, I presume that Continental will appeal this and the Supreme Court will get to look at it again. It's been up there twice. I don't know why it won't go the third time. But, if the Supreme Court says I am wrong, why, you can bring it back and I will change my position. I am just trying to do what the Supreme Court says for me to do.

MR. SEARLS: If the Court please, the government has proposed a judgment and it is attached to its brief, which

is very objectionable to us. If the Court is going to enter judgment against us, in the first place they prevent us from taking on even a service station in the state of New Mexico for ten years, which [80] is very penal and I don't think it's necessary to carry this out.

THE COURT: Well, I don't know what to do. I am not trying to be mean with you, Mr. Searls, and I am not trying to be contentious. I just want to do whatever the Supreme Court thinks I ought to do and you made a very eloquent address here and it was very forceful, but I was just afraid, and I am afraid, and it's my best judgment that my decision was not in conformity with what the Supreme Court had said since it was made. If it had been considered immediately when I made it, I don't think that I would have been out of line, but in view of the *Von's Grocery* case, particularly, why, I felt that perhaps I had erred and that I was wrong.

MR. SEARLS: At the right time we would like to be heard in opposition to the judgment, which the government proposes, because we think it very penal.

THE COURT: I wonder if you fellows could maybe work out some judgment that you could approve as to form. I don't want you to stipulate yourselves out of an appeal, necessarily, Mr. Searls, but I am not trying to be penal with you because I felt in all seriousness that you were right when I tried this case, and based on the law as I read it at that time I felt that I was right, and, of course, then when the *Von's Grocery Company* case came [81] along, why, I felt like maybe I had erred and so I don't feel that anybody has failed to act in good faith here at all, Mr. Searls.

MR. SEARLS: Yes, sir. Well, we would be glad to try to get with the government on the form of judgment, but we would not want to agree to anything that would be penal

in character that would at any time in the future keep us from acquiring any service stations, even a single service station under the judgment they propose.

THE COURT: I didn't go over it very carefully and haven't gone over it very carefully, but I have read all your briefs. I want you to know that. What I say now wasn't done on the spur of the moment. I have read all the briefs and read and re-read the *Pabst* case and *Von's Grocery* case and thought about them and studied them. I don't know. I didn't want you to think that I was going off half-cocked here in my opinion, but you men see if you can get together on a form and, as I said, I don't want you to stipulate that the judgment be entered but maybe you could approve it as to form only and then reserve your rights to appeal so that you may have the Supreme Court review what I have done here.

MR. SEARLS: Yes, sir.

MR. SOMERVILLE: Very well, Your Honor, we would be happy to discuss it with Mr. Searls.

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THE COURT: Yes. Now we get to the questions of findings of fact and conclusions of law and I don't know what I should do because I think some of my findings in the original case would still be the same now, in other words, as to all those matters as to percentages, and so on. I don't think the facts have changed a bit. It's more a question of conclusion. The only thing that might change is a question of — a matter of fact would be this relevant market area because definitely the *Pabst* case says that we don't take in the whole market area; any area that is relevant. I think you all agree that New Mexico now is the relevant market area, rather than the bigger area that

I had considered to begin with. That being so, that will have to be changed. But as to the sales in New Mexico, why, they haven't changed a bit. It's just a question of whether my conclusions were wrong and I felt that perhaps in view of the Supreme Court cases my conclusions were wrong.

Now the other case drug on a long time from the time I decided it until it reached the Supreme Court, and both of these cases came down in the interim, and whatever is done, this case has been on the docket a long time and I hope counsel on both sides will see if we can't take care of this in a reasonable time. I don't want to crowd you nor to require something that isn't required by **[83]** the rules or anything of that sort, but I just hope that you men will get it up there and let the Supreme Court say what they want to say about it if I am wrong. If I am wrong, why, fine. I will back up and do what the Supreme Court tells me to do, naturally. If I am right, they can say so. But I have just had to decide this the best I could in the light of what the cases were when I decided it, and in light of the cases that have been decided since I first announced my decision. As the Supreme Court says, it isn't what some person, individual person might think is the wise course but it's what Congress has said and they are simply attempting to carry out what Congress has said about the anti-trust laws and I am simply trying to carry out what the Supreme Court has said.

All right. Court will stand in recess.

(Transcript of October 11, 1967 Hearing)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff vs. CONTINENTAL OIL COMPANY, Defendant	Civil No. 4763

DECISION AND OPINION ON REMAND
[November 17, 1967]

PAYNE, D. J.: On May 29, 1967, the Supreme Court of the United States vacated the judgment entered herein on September 20, 1965, and remanded the case to this court "for further consideration in light of *United States* v. *Pabst Brewing Co.*, 384 U.S. 546". Thereafter, defendant, Continental Oil Company, moved for judgment on the record. Plaintiff countered by urging that such motion be denied and that, instead, judgment be entered for the United States. Briefs were filed by both sides; and, following a hearing on October 11, 1967, whereat counsel for the respective parties presented their arguments, this Court announced that, in view of the Supreme Court's remand, this Court was constrained to enter judgment in favor of the United States.

I felt that I could not consider the case mentioned above without considering the cases to which it refers. One of the cases cited was *United States* v. *Von's Grocery Company*, 384 U.S. 270. Reference is made to both of those cases and the cases they cite. I will make no attempt to discuss them here. However, in view of these cases and the state-

ments of the Supreme Court, I took the position that the acts in this case would require my reversal of my previous decision.

To begin with, New Mexico alone should be regarded as a relevant market area for a determination of the effect of what had occurred by the acquisition mentioned in the previous opinion.

Viewed in the light of the aforementioned decision, I find that the acquisition was a violation of Section 7 of the Clayton Act. The acquisition of this refinery increased the share of the market control by Continental even though it may not have intended to violate the law. The mere acquisition of an additional share of the market by a company as large as Continental would, and did, increase its control of the market in the relevant market area. Such control substantially lessened competition in New Mexico.

The opinion of the Supreme Court in the *Pabst* case seems to hold that all of the details and reasons behind the Court's findings need not be set out. It is enough to show that a large company has made an acquisition which would substantially lessen competition in the relevant market area. The Court concludes that this was the effect of the acquisition of the refinery by Continental.

Instead of making any further detailed findings and conclusions, the Court does hereby adopt the findings and conclusions previously made insofar as they are not in conflict herewith and as they are modified by this decision. This decision shall constitute the findings of fact and conclusions of law of the Court, and the requests for findings and conclusions by the parties, insofar as they are inconsistent with this opinion, are hereby denied. The Court does adopt all of the stipulations of the parties as facts in this case, in addition to those which the Court has found.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plainiff vs. CONTINENTAL OIL COMPANY, Defendant	No. 4763 Civil

H. VEARLE PAYNE, JUDGE

DECISION AND OPINION
[September 7, 1965]

In this Decision and Opinion the defendant, Continental Oil Company, will be referred to as "Continental." Malco Products, Inc., a New Mexico corporation, will be referred to as "Malco." The companies which preceded Malco will be called by their names, so that a distinction can be made between them. For clarity, the Court hastens to explain that the present company, named Malco Products, Inc., is a New Mexico corporation. It was preceded by Malco Products, Inc., a Delaware corporation. Hondo Oil and Gas Company was previously a party to this case, and it was preceded by Malco Refineries, Inc.

So that this Opinion will be better understood, it is necessary to give just a little history of the refinery, which is the subject matter of this suit. Prior to May 1, 1959, it was owned and operated by Malco Refineries, Inc., in the manner which will hereinafter be set forth. On said date Malco Refineries, Inc. leased to Continental, for a period

of 20 years, its refinery at Artesia, New Mexico, with an option to Continental to purchase the refinery at the end of 20 years for $100,000.00. On or about August 1, 1959, Malco Refineries, Inc. conveyed its assets, including its interest in the lease purchase contract, to Hondo Oil and Gas Company, a New Mexico corporation. About that time, Malco Products, Inc., a Delaware corporation, was organized as a subsidiary of Continental, and it carried on the marketing operations of the refinery in question, until July 1, 1965, at which time it conveyed substantially all of its assets to Malco Products, Inc., a New Mexico corporation.

The old Malco Products, Inc., a Delaware corporation, has changed its name to Oclam, so that there will be no confusion between the new corporation and the old one.

The parties have stipulated that the transaction by which Continental acquired the refinery was an acquisition within the meaning of Section 7 of the Clayton Act, even though it was a long-term lease with an option to purchase. This transaction occurred on May 1, 1959, and it is this acquisition which is the subject matter of this action.

Suit was filed on May 16, 1961. Thereafter, the defendant filed a motion to add Hondo Oil and Gas Company as a party defendant. On September 18, 1961, the Court entered its order herein granting the motion to add Hondo Oil and Gas Company as a defendant and authorizing the plaintiff to file an amended complaint accordingly. On October 23, 1961, the plaintiff filed its amended complaint. Thereafter, an answer was filed by the defendants.

A stipulation was filed narrowing the issues by excluding crude oil as a line of commerce. This was filed on July 10, 1963. On the same date, there was a first stipulation of facts, a second stipulation of facts and a third

stipulation of facts filed in the case. On July 29, 1963, a fourth stipulation of facts was filed. Immediately thereafter, Continental Oil Company filed a motion for summary judgment. On September 27, 1963, the Court entered its order and judgment herein granting the motion of Continental Oil Company for summary judgment and the amended complaint was dismissed as to both defendants. On November 26, 1963, the United States gave notice of appeal to the Supreme Court of the United States from the order granting Continental's motion for summary judgment. It did not appeal from the order insofar as it dismissed the complaint against Hondo Oil and Gas Company. In due course of time the Supreme Court reversed the decision of the District Court and remanded the case for a trial on the merits, 377 U.S. 161. The Hondo Oil and Gas Company took the position that it was no longer a party to the case since no appeal had been taken by anyone from the order dismissing it from the case. This position was sustained by the trial court. Continental filed a motion to bring the Hondo Oil and Gas Company back into the case but the Court denied the motion and also entered an order striking the name of Hondo Oil and Gas Company from the style of the case. This case thereafter came on for trial on the merits and the Court heard all of the evidence in behalf of the plaintiff and in behalf of the defendant Continental.

LINE OF COMMERCE

The first problem in a case of this type is to determine the line of commerce that is involved. The parties hereto have stipulated that gasoline is the line of commerce and, therefore, there is nothing for the Court to decide in this matter. It is true that a great deal of testimony was presented with regard to the different grades and prices of gasoline and the different manner of handling sales. There

was testimony concerning the companies which sold gasoline under a brand name and those that did not, as well as testimony concerning the prices of gasoline even when sold under a brand name. However, the parties still agreed, and the Court concurs, that gasoline is the line of commerce. In passing, it might be well to comment that the evidence showed that all gasoline was in competition with other gasoline regardless of the price or quality.

RELEVANT MARKET

Section 7 of the Clayton Anti-Trust Act, insofar as it relates to the acquisition of the assets of one corporation by another, refers to a line of commerce "in any section of the country." In other words, the Court must determine what section of the country is involved and this is commonly referred to as the relevant market area. The plaintiff contends that New Mexico is the relevant market area and that Albuquerque is a sub-market. The Court finds that the entire State of New Mexico, El Paso County, Texas and the eastern half of Arizona, extending to and including all of Maricopa County, Arizona, is the relevant market area in this case. That includes, of course, Tucson, Nogales, Flagstaff and other places in eastern Arizona.

Although in the sale and distribution of gasoline it is necessary to consider both the market area and the source of supply, this Opinion will first be concerned with the relevant market area. The Supreme Court in United States v. DuPont and Company, 353 U.S. 586, at page 593, seems to define the relevant market area as the "area of effective competition."

In Brown Shoe Company v. United States, 370 U.S. 294, at page 333, it is stated that in determining the effect of an acquisition the Court must consider such effect on competi-

tion generally in an economically significant market. In United States v. Philadelphia National Bank, 374 U.S. 321, at page 357, the Court said:

> "The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive over-lap, the effect of the merger on competition will be direct and immediate."

It was necessary for the Court to examine the facts to determine the relevant market area in accordance with the law hereinbefore set forth. Both parties agreed that New Mexico was a relevant market area, but the plaintiff contends that it is the entire relevant market area and that Albuquerque is a sub-market. On the other hand, the defendant contends that New Mexico, Arizona and El Paso County, Texas, is the relevant market area. The Court has heretofore defined what it finds to be the relevant market area.

It does not appear to be necessary to discuss New Mexico as a part of the relevant market area since the parties do not dispute this fact. However, the Court will discuss its reasons for including the other areas.

From the evidence, including the maps, it does not appear that the acquired company served Western Arizona. The evidence disclosed that it did serve that portion of Arizona mentioned in the relevant market area, and the sole question remaining is whether or not the sales were substantial enough to amount to effective competition within the meaning of the law heretofore mentioned.

The evidence shows that in 1959, when the acquisition occurred, the company owning the Artesia Refinery was selling gasoline to various people who owned Malco stations in eastern Arizona. Among other things it was shown that

there were 16 such stations in Tucson, 11 in Phoenix, and a number of other stations scattered over the eastern part of Arizona. In 1958 these sales amounted to 13,753,000 gallons in Arizona. The Court heard the various witnesses who operated some of the Arizona service stations or who distributed to other stations in that area. From the entire evidence in the case the Court finds that the portion of Arizona, heretofore described, was a part of the relevant market area and that the gasoline sold there both before and after the acquisition was substantial enough to bring that area within the relevant market area.

During the year 1958 Malco Refineries, Inc. sold 3,850,000 gallons of gasoline in El Paso County, Texas, exclusive of sales of gasoline to other refineries. However, of this amount they purchased 1,988,000 gallons from the Standard Oil Company for resale. That means that they sold in that area 1,862,000 gallons of gasoline not purchased from others and 1,988,000 gallons of gasoline purchased from Standard Oil Company. This was 3.12% of the total sales in El Paso County, Texas.

The Court does not remember whether or not there was testimony concerning service stations in El Paso which used the Malco gasoline in 1959. There is evidence that Malco Refineries sold gasoline from 1956 to 1959 to a Mr. Edmondson, or his family, in El Paso. This may have continued to 1960. Mr. Edmondson died in 1957 and a Mr. McNutt bought the business from his widow in 1960. It was at that time an active business and distributing products under the Malco name. Mr. McNutt, at first, purchased his supplies from El Paso Natural Gas Company, but in 1961 he switched back to Malco. He had 18 stations in El Paso and 14 in New Mexico. It was not shown how many of these he acquired from Edmondson's widow but apparently there was a good deal of gasoline being dis-

tributed in El Paso which came from the refinery of Malco Refineries Company in 1959, when the acquisition occurred, and there has been a good deal sold ever since that time in that area. From that the Court finds that El Paso County, Texas, is one part of the relevant market area. In fact, there is now a pipe line from the refinery at Artesia, New Mexico, to El Paso, and it connects with the line going to Tucson and Phoenix, Arizona. And there is another line connecting El Paso with Albuquerque, New Mexico. This area cannot be ignored in determining the questions before the Court.

The parties have stipulated that the total sales of gasoline by Malco Refineries, Inc., in New Mexico, after excluding sales to other refineries, for 1958 was 23,427,000 gallons or 6.2% of the total sales for the state, and that the total sales of Conoco for the same year, after excluding sales to other refineries, was 36,404,000 or 9.63%. This is a total of 15.83% of sales in New Mexico. It was further stipulated that the sales by Conoco, together with Malco Products, Inc., a Delaware Corporation, in New Mexico, excluding sales to other refineries, for 1961 (after the acquisition) was 39,976,000 gallons or 14.68%, showing that Continental and its subsidiary, after the acquisition, sold less than the two companies did before.

The Court finds, however, that Malco Products, Inc., a Delaware Corporation, was operated by Conoco exactly as it or its predecessor had been operated before the acquisition. It was an active competitor on the market and operated just as it did before so that it did not diminish competition in the least.

The Court further finds that the production of Malco Refinery [*sic*], Inc., for 1958, was 6.4% of the consumption in the relevant market area and the production of Conoco

for that year was 3.2% of the consumption in the relevant market area, for a total of both companies of 9.6%. For 1961 the total of Conoco, with its said subsidiary, was 7.2% of the consumption for the relevant market area. This included the sales to other refineries.

When sales to such other refineries are excluded the production of Malco Refinery [*sic*], Inc. was 4% and Conoco was 2.2% for a total of 6.2% in the relevant market area. By 1961 (after the acquisition) the production of Conoco, with the subsidiary, was 3.6% in the relevant market area.

The parties stipulated to facts which show the number of and the capacity of the refineries in New Mexico. The contention was advanced by the United States that the production of the refineries of Malco and Continental, when combined by the acquisition, would be large enough to reasonably tend to lessen competition in New Mexico. The Court has found that New Mexico, alone, is not the relevant market area. The Court further feels that the production of the two refineries in question, even if combined, is not the ultimate test in determining whether or not competition is lessened. For instance, Arizona, a part of which is the relevant area, has no refinery at all. In other words, the Court has to look to the relevant supply area as well as the relevant market area in determining the effect, if any, on competition of the acquisition. That applies to New Mexico and El Paso County, Texas, as well as Arizona. The Court cannot look to the production alone in New Mexico and shut its eyes to the importation of gasoline from other areas in determining the effect of the acquisition. Neither can the Court fail to consider sales of gasoline by Malco and Continental to other refineries in determining the effect of the acquisition on the consuming public.

In presenting the facts to the Court the parties considered Arizona as a whole and did not attempt to separate the figures so as to show them as they relate to the relevant market area mentioned by the Court. For that reason the findings of the Court will have to refer to the entire State of Arizona, even though the Court has not considered the entire state to be in the relevant market area. However, the large metropolitan areas of Phoenix and Tucson, and in fact the great portion of the population of Arizona is in the relevant market area, and for all practical purposes we may take the figures which have been presented.

From the foregoing facts it is clear that the concentration of supply in New Mexico cannot be gauged by merely considering the refineries in New Mexico, nor in the relevant market area. Southern California, with its mammoth gasoline supply, cannot be ignored as a source of gasoline for Arizona. Neither can west Texas be ignored as a source of supply for the entire relevant market area heretofore defined. In determining whether or not there has been that degree of concentration condemned by the Supreme Court this entire picture must be taken into account.

In addition the Court finds that there is a practice of exchanging gasoline between companies which affects enormous supplies of gasoline. For that reason the refineries in a certain area are not the sole and only consideration. Large companies in other areas exchange gasoline in order to conserve transportation costs. These exchanges make it possible for companies which do not have a refinery in a designated area to exchange gasoline with refineries that do. This works to the advantage of both refineries and saves transportation for each. This cannot be ignored in determining the question of competition. As an example, a company which has a refinery in Texas, which does not have a refinery in southern California, may exchange gas-

oline with some company that does have a refinery in southern California. By this device the refinery in Texas could deliver gasoline in Albuquerque, in exchange for gasoline delivered at Phoenix by the refinery from southern California. The testimony indicated that this system is used widely in the industry. In other words, the source of supply is often enlarged to wide areas by the exchange of products. This enlarges the number of suppliers and minimizes or eliminates concentration or control by a few.

In order to determine the effect on competition it is necessary then to determine what the supply of gasoline may be for the relevant market area. This cannot be determined by the refineries in New Mexico alone but must be determined from a practical standpoint, considering any refineries which may, in the usual course of business, supply the area.

There is a refinery belonging to Shamrock near Dumas, Texas, with a capacity of 25,000 barrels per day; one at Borger, Texas, belonging to Phillips, with a capacity of 71,000 barrels per day, and one at Amarillo, Texas, belonging to Texaco, with a capacity of 19,000 barrels per day. These three refineries are connected to a pipe line which runs westerly into New Mexico, with terminals at Tucumcari and Albuquerque. There is also a pipe line connecting them with Lubbock, Texas, which is close enough to service part of New Mexico.

Albuquerque is likewise connected to El Paso, Texas, with a pipe line. There are two refineries at El Paso, one with a capacity of 53,000 barrels per day and one with a capacity of 16,000 barrels per day.

El Paso is connected with a refinery at Odessa, which has a capacity of 13,000 barrels per day, and a pipe line to Artesia, New Mexico, where Conoco had a refinery with

a capacity of 4,000 barrels per day and where the Malco refinery is situated, which is in controversy here, which had a capacity of 11,500 barrels per day.

El Paso is connected to Tucson and Phoenix by a pipe line known as Southern Pacific Pipe Lines. In turn, Phoenix and Tucson are also connected to a pipe line to southern California, where there are 8 refineries, some of them very large. Likewise, southern California also gets gasoline from the northwestern area.

There are also refineries in west Texas, which supply gasoline into parts or [*sic*] the relevant market area by truck, which are not connected to pipe lines. For instance, Cosden has a refinery at Big Spring, Texas, with a capacity of 30,000 barrels per day. There are also others.

There was no evidence to show that the existing pipe lines were running to capacity. The Court finds that if they were they could easily and cheaply enlarge their capacity to meet greater and further demands on the supply.

From all of the foregoing it is the opinion of the Court that the acquisition in controversy did not substantially diminish competition and that there is no reasonable expectation that it will do so in the future. A careful examination of the map designated as Continental Exhibit 81, with the attending testimony, convinces the Court that competition on the retail level and on the refinery level has not been substantially changed and that there is no reasonable expectation that it will be affected in the future.

The Court heard the witnesses testify concerning the purpose of the acquisition as well as concerning the manner in which the new refinery was used by Continental after the acquisition. From all of the testimony the Court finds that it was the purpose and intent of Continental to operate

the property acquired in the same way it had been previously operated. In other words, Continental did not acquire the property for the purpose of strengthening its position in its standard branded gasolines, nor did it use the property acquired for that purpose. The property was used for a continuation of the practices and policies which had been theretofore followed by Malco Refineries Incorporated.

Furthermore, prior to trial, Continental transferred to a Mr. Copple and his sons the entire stock, ownership, possession and control of the distribution portion of the acquisition. There were no conditions nor ties of any kind so that the distribution portion of the business acquired is no longer under the control of Continental. In that connection, Continental has agreed to furnish the gasoline supply to Malco, now owned by the Copples, for a period of years. This agreement is such that it cannot be cancelled by Continental. Malco is left free to purchase gasoline anywhere it may desire. There is, however, a provision that Continental will furnish only the amount of gasoline purchased in each previous year plus 3%. In other words, if Malco buys its gasoline elsewhere it may diminish or lose the right to purchase from Continental in the succeeding year. This contingency does not seem likely to the Court and it does not take away the independence of Malco in any degree. The amount of gasoline being imported into the relevant market area seems more than adequate to provide a source of supply for any company desiring to purchase.

The Court finds from the evidence that all prices and quality of gasoline is in competition with all other gasoline. None of the witnesses disagreed on this point. In other words, the major companies are in competition with the independent companies and vice versa. It was conceded that gasoline was the line of commerce. There was no issue then to determine whether or not there were various lines of commerce based on the price or quality of gasoline.

It was developed that competition is based on three elements, namely, price, quality and service. In other words, the price of some gasoline may include service as well as quality. On the other hand, some stations cut the price and do not give service or quality. Nevertheless, all gasoline was found to be in competition with all other gasoline and the consuming public makes its choice after considering all phases of this competition.

It was developed that there was a differential in the price of gasoline sold by major companies and independent companies which was more or less constant. When one line of gasoline was sold at a lower price the other line followed so as to maintain this differential. This was not an unqualified rule but it applied in most instances.

The Court now wishes to make its conclusions on the facts heretofore set forth.

The line of commerce was agreed upon. This met the requirements set forth in Brown Shoe Company v. U. S. 370 U.S. 294, at page 326. It was gasoline.

The Court has determined the relevant market area as required in United States v. DuPont & Company, 353 U.S. 586 at page 593. The Court has followed the definition of the relevant market area as defined in United States v. DuPont, supra, Brown Shoe Company v. United States, 370 U.S. 294 at page 335, and United States v. Philadelphia National Bank, 374 U.S. 321 at page 357. The Court concludes that the relevant market area is as heretofore defined and that such meets the requirements of the cases just cited.

The Court concludes that the percentage share of the market of Continental before and after the acquisition was not sufficient to bring it within the presumption of being anti-competitive as set forth in United States v. Aluminum

Company of America, 377 U.S. 271, United States v. Continental Can Company, 378 U.S. 441 or United States v. Philadelphia National Bank, 374 U.S. 321. The Court concludes that this percentage share of the market cannot be determined from the refineries in New Mexico alone. The Court further concludes that the market share of Continental and Malco, combined in the relevant market area did not bring Continental within this anti-competitive category. The Court further concludes that the market share of Continental went down after the acquisition when compared to the total of both companies. The Court further concludes that the distribution of gasoline was continued by a subsidiary company, in competition, just as it had before the acquisition. The Court further concludes that Continental has divested itself of the distribution system which it acquired. The Court further concludes that the United States has not proved any substantial lessening of competition in the past nor any reasonable probability of lessening competition in the future. In fact, the Court concludes that competition has not been affected at all.

The Court concludes that Albuquerque is not a sub-market any more than any town in New Mexico is a sub-market. There was nothing to distinguish it from other towns except its size and the fact that there is a terminal in Albuquerque on the pipe lines. Its problems are no different than Santa Fe, Roswell, Las Cruces or other cities in New Mexico. It is true that each city may be a sub-market in the sense mentioned in the Brown Shoe case, supra, still if that is to be taken as a fact the Court concludes that the effect of the acquisition did not affect Albuquerque any more than any other place in the relevant market area.

In passing, the Court wishes to say that it has considered post acquisition evidence as well as the other evidence

in determining the facts and conclusions in this case. The Court felt this was justified under the ruling in F.T.C. v. Consolidated Foods, 380 U.S. 592.

The Court concludes that the intent of Continental in acquiring the property in question was not to stifle competition. The Court felt that this could be considered as a factor in the case by virtue of the holdings in Brown Shoe Company v. United States, 370 U.S. at page 346, and United States v. Philadelphia National Bank, 374 U.S. at page 371. In that regard the Court concludes that Malco Refineries Incorporated was a marginal operation which was casting about to find a purchaser; that the Continental refinery had a life expectancy of only about two years and that Continental felt that the only practical solution was to combine the two refineries. The Court also concludes that Continental did not acquire the new company for the purpose of increasing its sales or influence as a major company but only to continue the company acquired in the same way it had been conducted in the past.

From all of the foregoing the Court concludes that the United States has failed to prove the material allegations of its complaint and that the complaint should be dismissed.

An order may be prepared and submitted by the Defendant after approval as to form by the Plaintiff.

H. VEARLE PAYNE

United States District Judge

25A

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
Plaintiff,
vs.
CONTINENTAL OIL COMPANY,
Defendant.

Civil Action
No. 4763

FINAL JUDGMENT
[February 21, 1968]

Plaintiff, the United States of America, filed its Complaint herein on May 16, 1961; and after trial by this Court, a Final Judgment was entered dismissing the case on September 20, 1965. The Supreme Court of the United States on May 29, 1967 vacated said Final Judgment of September 20, 1965 and ordered reconsideration of this case. Following the submission of memoranda and oral argument; and the Court having entered findings of fact and conclusions of law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto pursuant to Section 15 of the Act of Congress of October 15, 1914 (15 U.S.C. § 25), as amended, commonly known as the Clayton Act. The acquisition of the properties of Malco Refineries, Inc. by defendant Continental Oil Company (Conoco) is in violation of Section 7 of the Clayton Act (15 U.S.C. § 18).

II.

The provisions of this Final Judgment applicable to Conoco shall also apply to each of its directors, officers, agents, employees, subsidiaries, successors and assigns, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III.

(A) Conoco is ordered and directed, within twelve (12) months from the date this Judgment becomes final, to divest itself of all of its right, title and interest in the following properties:

(1) The Artesia refinery plant facilities and related assets (including any transferable crude oil import quota allocable or attributable to the refinery facilities); and

(2) The following pipelines connected with said refinery:

(a) *incoming pipelines:* The crude oil system, the LPG system; any natural gas lines used or useable to supply fuel gas; and (b) *outgoing pipelines:* the petroleum products line running from said refinery to El Paso, Texas (excluding Conoco's interest in the products terminals at El Paso, Texas; Albuquerque, New Mexico; and Tucson and Phoenix, Arizona), and the jet fuel pipeline (including delivery facilities) running from said refinery to Walker Air Force Base near Roswell, New Mexico.

(B) Conoco is ordered and directed to publicize the availability of the above properties for sale in appro-

priate trade and/or financial publications and, in general, to promote the expeditious sale thereof. Sale shall be upon terms and to a person approved by this Court and it is the intent of the Court that the purchaser can be expected to operate the refinery and other properties acquired primarily but not exclusively as a supplier of gasoline to independent marketers.

(C) Conoco is ordered and directed to render bi-monthly written reports to the Court, with copies to the plaintiff, detailing its efforts to comply with subsection (A) above, and the results of such efforts, including every offer to buy which it received. Plaintiff or Conoco may apply to this Court for approval or disapproval of any proposal for the sale of said facilities.

(D) Conoco is ordered and directed to furnish to all bona fide prospective purchasers all relevant information regarding said facilities, and to permit them to inspect such facilities, at reasonable hours.

IV.

For a period of ten (10) years from the date of entry of this Final Judgment, Conoco shall not without first obtaining the approval of this Court, acquire directly or indirectly (excluding construction by Conoco), any interest in any of the following businesses or facilities in the State of New Mexico:

(a) any oil refinery;

(b) any wholesale distributor of gasoline, provided this subsection (b) shall not prohibit in each twelve (12) month period any acquisitions of such businesses having combined annual sales of not more than $250,000 or acquisitions of wholesale distributors who have

been selling gasoline exclusively under the trademark "CONOCO" for a period of at least one year prior to their acquisition by Conoco or acquisitions of retail outlets, but this is without prejudice to any claim asserted by the plaintiff in a subsequent antitrust action with respect to the acquisition of retail outlets.

V.

For the purpose of determining and securing compliance with this Final Judgment, and for no other purposes, duly authorized representatives of the Department of Justice shall, on written request of the Assistant Attorney General in charge of the Antitrust Division and on reasonable written notice to Conoco made to its principal offices, be permitted, subject to any legally recognized privilege:

(i) access, during the office hours of Conoco, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Conoco regarding the subject matters contained in this Final Judgment, provided, upon such written request, Conoco shall submit reports in writing in respect to any such matters as may from time to time be requested; and

(ii) subject to the reasonable convenience of Conoco and without restraint or any interference from it, to interview officers or employees of Conoco, who may have counsel present, regarding any such matters.

No information obtained by the means provided in this Section V shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the

United States, except in the course of a legal proceeding in which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

VI.

Jurisdiction of this cause is retained by the Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the enforcement of compliance therewith and the punishment of violations thereof.

VII.

Defendant Continental Oil Company shall pay such costs as shall be taxed against it by the Court.

ENTERED this 21st day of February, 1968.

/s/ H. VEARLE PAYNE
United States District Judge

APPROVED AS TO FORM:

By /s/ LAWRENCE W. SOMERVILLE
Attorney for the United States

By /s/ DAVID T. SEARLS
Attorney for defendant Continental Oil Company